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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. DEVIN WRIGHT, Defendant and Appellant.	B293528 (Los Angeles County Super. Ct. No. NA106858)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jesus (Jesse) Rodriguez, Judge. Affirmed.

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Joseph P. Lee, and Jaime L. Fuster, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found appellant Devin Wright, an admitted pimp, guilty of various offenses against three young women: C.R., A.D., and S.T. As against C.R., the jury found Wright guilty of human trafficking (Pen. Code, § 236.1, subd. (b)),[1] making criminal threats (§ 422, subd. (a)), assault by means likely to produce great bodily injury (§ 245, subd. (a)(4)), and having a concealed firearm in a vehicle (§ 25400, subd. (a)(1)). The jury found Wright guilty of human trafficking upon both S.T. and A.D. (§ 236.1, subd. (c)(1).)

On appeal, Wright contends that the introduction of C.R. and A.D.'s preliminary hearing testimony in lieu of live testimony at trial violated his rights under the confrontation clause. On this basis, Wright seeks reversal of the human trafficking convictions involving these two women.

Wright further contends that all three human trafficking convictions should be reversed, because the court incorrectly instructed the jury regarding pandering, one of two possible predicate offenses underlying those convictions. Specifically, he argues the court incorrectly instructed the jury that one can commit pandering by encouraging a woman already engaged in prostitution "to become a prostitute," and that the three victims were already prostitutes when he met them.

Our Supreme Court precedent squarely addresses and rejects both of Wright's arguments. Accordingly, we affirm.

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[1] Unless otherwise indicated, all statutory references are to the Penal Code.

FACTUAL BACKGROUND

A. *Preliminary Hearing Testimony*

All three victims testified at the preliminary hearing. Wright's counsel was afforded the opportunity to cross-examine them, but chose not to cross-examine C.R.

1. *A.D.*

In A.D.'s preliminary hearing testimony, she stated she had been a prostitute for years before meeting Wright, whom she characterized as a "friend." She testified she knew Wright was a pimp, and knew C.R. to be one of his prostitutes, but denied ever working for him herself. The prosecution impeached A.D.'s testimony at the preliminary hearing with a video and transcript of A.D.'s statements during a police interview. During that interview, she told police that she worked for Wright for a few days when she was 17 years old, that he taught her the "rules of the game," and that he knew how old she was.

2. *C.R.*

C.R. testified at the preliminary hearing that she was already working as a prostitute when she met Wright, and denied Wright was her pimp. The prosecution impeached her with recordings of wiretapped conversations between C.R. and Wright, in which he referred to her as his "hoe" and discussed her efforts to prostitute for him.

B. *Trial Evidence Most Relevant on Appeal*

1. *Testimony of A.D., C.R., and S.T.*

Because A.D. and C.R. were unavailable to testify live at trial, their preliminary hearing testimony was read to the jury.

S.T. appeared at trial and testified that she had met Wright via Facebook when she was 17 years old. S.R. further testified

that, after she told Wright she was having financial difficulties and difficulties living with her mother, Wright brought up the subject of S.T. working as a prostitute for him. When she told Wright that she had thought about prostitution, but viewed it as "nasty and disgusting," Wright insisted there was "good money" in the work. S.T. ultimately moved in with Wright. Wright explained to her where and how to prostitute herself, transported her to and from the streets where she did so, and collected the money she earned as a prostitute.

2. *Testimony of Dr. Mary Hannon*

In support of charges that Wright assaulted C.R. on or around June 23, 2017, the prosecution offered the testimony of Dr. Mary Hannon, an emergency room physician who treated C.R. for broken ribs on that day. Hannon testified that, at the emergency room, C.R. admitted to having been assaulted that morning, but would not state by whom.

3. *Wiretap recordings from Wright's telephone*

The prosecution played for the jury recordings of 23 telephone calls from a wiretap of Wright's telephone. Among these were several calls between Wright and C.R., in which Wright complains about the amount of money C.R. is making or difficulties in dealing with her as his prostitute, and threatens to beat or kill her. For example, in one such call, Wright stated that he wanted to punch C.R.'s face for lying to him and making only $100 all night. In another call, he complained about C.R. not calling him after a "date" and threatened to shoot her or beat her up.

In a conversation between Wright and C.R. on the evening of June 23—the day C.R. had been in the emergency room with broken ribs—C.R. told Wright that he had beaten her badly, that her body hurt, and that she did not feel well during her "dates." In another

call to C.R. that evening, Wright acknowledged "beating [her] ass" on multiple occasions and told her "the only reason you in the hospital right now is because you asked for me to take my anger out on you" and "you made me beat your ass."

In a recorded call between Wright and an unknown male later that day, Wright complained he was not making enough money, blamed his prostitute, and admitted breaking the prostitute's ribs.

Finally, in a recorded call between Wright and C.R. from June 24, Wright threatened to shoot C.R. with a .22-caliber gun. After listening to this call, the Long Beach Police Department monitoring the calls began searching for Wright to prevent him from carrying out his threat, and ultimately found him parked at a gas station near an area known for prostitution, where they arrested him and found a loaded .22-caliber handgun on the front floorboard of his car.

4. *Wright's testimony*

Wright testified that he has been a pimp since he was in high school, but denied encouraging any of the three women to engage in prostitution. He denied having a pimp/prostitute relationship with S.T. or A.D. He testified that S.T. already wanted to be a prostitute when she met him, even though she only started prostituting herself after he moved in with her. Wright acknowledged having a pimp/prostitute relationship with C.R., but testified she was free to leave him anytime she wanted. He testified that his threats to C.R. during their wiretapped telephone conversations were not serious, and that he did not break her ribs, although he had hit her a few times over the years.

C. *Jury Instructions Regarding Human Trafficking, Pimping, and Pandering*

At trial, the court instructed the jury that, to prove Wright guilty of the human trafficking offenses charged, the prosecution had to prove that (1) Wright either deprived another person of personal liberty, or violated the other person's personal liberty; and (2) when Wright acted, he intended to commit "a felony violation of pimping *or* pandering." (Italics added.) The court instructed that such a predicate felony violation of pimping required the prosecution to prove: (1) Wright knew the victim was a prostitute; and (2) the money the victim earned as a prostitute supported Wright in whole or in part.

The court instructed that the alternative predicate felony violation of pandering required the prosecution to prove: (1) Wright persuaded, encouraged, or induced another person to become a prostitute, regardless of whether these efforts were successful; and (2) Wright intended to influence the other person to be a prostitute. The pandering instruction clarified that it did not matter whether the other person was a prostitute already.

D. *Jury Verdict and Appeal*

The jury found Wright guilty of human trafficking upon all three women. The jury did not make any more specific findings as to whether the intent element of each of these counts was satisfied by an intent to commit pimping or an intent to commit pandering, either of which would have been sufficient to support a guilty verdict. (See § 263.1, subds. (b) & (c).) The jury also found Wright guilty of criminal threats and assault by means likely to produce great bodily injury upon C.R., and of having a concealed firearm in a vehicle. It found him not guilty of the additional charge of attempted murder against C.R. The jury found true various gang

and great bodily injury enhancement allegations. Wright filed a timely notice of appeal.

DISCUSSION

Wright raises two issues on appeal. First, he contends admission of A.D.'s and C.R.'s preliminary hearing testimony violated his constitutional right to confront the witnesses against him at trial, and challenges his two human trafficking convictions involving these women on that basis. Second, he contends the court erred in instructing the jury that the human trafficking offenses with which he was charged could be predicated on a finding that Wright encouraged a person "to become a prostitute," even if that person was already engaging in prostitution. He seeks reversal of all three human trafficking convictions on this basis.

We review both issues de novo. (See *People v. Seijas* (2005) 36 Cal.4th 291, 304 (*Seijas*) [claims that implicate a defendant's constitutional right to confrontation subject to independent or de novo review]; *People v. Hamilton* (2009) 45 Cal.4th 863, 948 [legal correctness of an instruction reviewed de novo]; see also *People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432 [issues of statutory interpretation reviewed de novo].)

Wright's arguments fail under well-established California Supreme Court precedent. We find Wright's claims that this precedent does not or should not apply, or that we should call it into question, unpersuasive.

A. *Admission of Preliminary Hearing Testimony at Trial*

A defendant's federal and California constitutional right to confront witnesses at trial "is not absolute." (*People v. Smith* (2003) 30 Cal.4th 581, 609 (*Smith*).) "[W]hen a defendant has had an opportunity to cross-examine a witness at the time of [the witness's] prior testimony, that testimony is deemed sufficiently reliable to satisfy the confrontation requirement." (*People v. Samayoa* (1997) 15 Cal.4th 795, 851-852 (*Samayoa*), citing *California v. Green* (1970) 399 U.S. 149; *Crawford v. Washington* (2004) 541 U.S. 36*,* 55–56, 68 (*Crawford*).) The Evidence Code further requires that the defendant's "interest and motive" in cross-examining the witness have been "similar to that which [that party] has at the hearing at which the [prior] testimony is admitted." (*People v. Valencia* (2008) 43 Cal.4th 268, 291–292, citing Evid. Code, § 1291, subd. (a)(2).) They need only be "similar," not "identical." (*Samayoa, supra*, 15 Cal.4th at p. 850; *People v. Zapien* (1993) 4 Cal.4th 929, 975 (*Zapien*).)

Applying this framework, California courts " 'have routinely allowed admission of the preliminary hearing testimony of an unavailable witness' " and rejected confrontation clause arguments based on the inherent differences in a defendant's motive to cross-examine a witness at these two proceedings. (See *Seijas*, *supra*, 36 Cal.4th at p. 303; *Smith, supra*, 30 Cal.4th at pp. 611-612; see, e.g., *Zapien, supra,* 4 Cal.4th at p. 975.)

Wright suggests we reconsider this established precedent. He cites the inherent differences between a preliminary hearing and a trial, arguing these necessarily cause a defendant to have a unique motive in cross-examining a witness at each proceeding. But we are bound by out Supreme Court's conclusion that "the opportunity to cross-examine the witness at the preliminary hearing [need not

serve as] an exact substitute for the right of confrontation at trial" in order for preliminary hearing testimony to be admissible without violating the confrontation clause. (*Samayoa*, *supra*, 15 Cal.4th at pp. 850–851.) Where the defendant has a similar motive and interest in cross-examining a witness at the preliminary hearing, the confrontation clause is satisfied. (See *People v. Carter* (2005) 36 Cal.4th 1114, 1173-1174 (*Carter*).)

In the alternative, Wright argues the circumstances specific to his preliminary hearing and trial rendered his motive and interest at each dissimilar. Specifically, Wright argues that the prosecution presented "conflicting evidence relative to the theory of liability" at the preliminary hearing, in particular with respect to the pandering charges, and that he did not have "a constitutionally cognizable interest" in "choos[ing] between inculpatory testimonies" at that proceeding, because it "is designed only to test the bare minimum of the [g]overnment's case." Wright does not identify the purportedly conflicting inculpatory testimonies or theories he contends the prosecution presented. Even if the prosecution did so, however, we are not convinced that Wright needed to "endors[e] one version of the [prosecution's] case over another" at the preliminary hearing stage in order to secure "future mitigation" at trial. The general goal of a defendant at a preliminary hearing—to discredit *all* charges and testimony suggesting that the defendant committed *any* crime under *any* theory—is not at cross-purposes with a trial defense in which the defendant chooses to acknowledge a particular version or legal theory of the crimes charged. This is particularly true where, as here, the preliminary hearing testimony at issue either was not inculpatory, or inculpated Wright on issues also supported by other evidence presented at trial. Finally, Wright does not explain how the opportunity for further cross-examination of either C.R. or A.D. at trial would have allowed Wright to

more effectively endorse one of two conflicting versions of the prosecution's case. Thus, Wright's general interest at the preliminary hearing in discrediting any testimony suggesting Wright intended to engage in pimping or pandering—in any way under any legal theory—was similar to his interest at trial in discrediting some or all such testimony. (See *Samayoa, supra*, 15 Cal.4th at pp. 850–851 [defendant's interest in cross-examining witness at both the preliminary hearing and penalty phase of trial was "to attempt to discredit the witness's account of the crime and establish that the witness could not identify the person or persons who committed the rape and burglary"]; see also *Carter*, *supra*, 36 Cal.4th at p. 1173.)

Wright's final argument is that the preliminary hearing did not afford him an "*adequate* opportunity to cross-examine," as required by *Crawford*. *(Crawford*, *supra*, 541 U.S. at p. 57, emphasis added.) Wright first cites the limited ability of a defendant to affirmatively present evidence at a preliminary hearing. But Wright identifies no federal or California authority suggesting that a defendant must be able to affirmatively introduce evidence in order for a proceeding to afford "adequate" cross-examination. Wright next suggests his opportunity to cross-examine A.D. and C.R. was inadequate because he could not impeach them with their prior statements to police and statements by other prosecution witnesses. But these witnesses' prior contrary statements were presented at the preliminary hearing, and Wright was thus aware of them at that stage. Moreover, these prior witness statements supported *the prosecution's* version of events—not Wright's.[2] (See *Samayoa*,

[2] Specifically, in their preliminary hearing testimony, both witnesses denied Wright was their pimp, and that he encouraged them to become prostitutes, and C.R. did not identify Wright as

supra, 15 Cal.4th at pp. 850-851 [rejecting confrontation clause challenge to preliminary hearing testimony where defendant failed "to suggest . . . the evidence that might have been elicited from [victim witness] (had she testified at the penalty phase of the present capital case) but [that] was not elicited at the preliminary hearing, and that would have placed defendant's conduct . . . in a less aggravating light"].)

We further reject Wright's attempts to rely on the decisions of other states' courts analyzing whether those other states' preliminary hearing procedures afford adequate cross-examination. For example, Wright cites the Colorado Supreme Court's decision in *People v. Fry* (Colo. 2004) 92 P.3d 970, which discussed "the limited nature of the preliminary hearing in Colorado," and concluded such hearings did not satisfy confrontation clause requirements. (*Id.* at p. 977.) The Colorado Supreme Court expressly distinguished Colorado and California law in this respect, noting that a California preliminary hearing "constitutes a mini-trial," under which circumstances "unavailable witness's prior testimony at [a] preliminary hearing [is] admissible." (*Ibid.*, citing *California v. Green* (1970) 399 U.S. 149.)

B. *Jury Instruction Regarding Pandering*

In order to be guilty of the human trafficking violations with which Wright was charged, Wright must have acted with the intent to commit one of several predicate offenses listed in section 236.1. (See generally § 236.1, subds. (b) & (c).) The jury was instructed on two such predicate offenses: pimping under section 266h and

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the individual who assaulted her. In their statements to police, by contrast, both women stated they worked as prostitutes for Wright. In C.R.'s wiretapped conversations with Wright, she refers to Wright assaulting her.

pandering under section 266i. The jury's verdict form did not indicate whether the jury found that, in committing the human trafficking violations, Wright had acted with an intent to commit pimping, pandering, or both. The jury was instructed that pandering required Wright to have in some way encouraged a person "to become a prostitute," and that this could be the case, even if the person Wright so encouraged was already a prostitute. (See generally § 266i, subd. (a)(2).)

Wright argues on appeal that one cannot encourage a person already engaged in prostitution "to become a prostitute" under section 266i, and thus, that the court erred in instructing the jury regarding the predicate offense of pandering. Wright acknowledges that our Supreme Court rejected this argument in *People v. Zambia* (2011) 51 Cal.4th 965, 971-981 (*Zambia*).) There, the court concluded that section 266i's use of the phrase " 'to become a prostitute' means to 'engage in any future acts of prostitution,' regardless of the victim's status at the time of a defendant's encouragement." (*Id*. at p. 972.) Thus, "the proscribed activity [in section 266i] of encouraging someone 'to become a prostitute' [citation] includes encouragement of someone who is already an active prostitute, or undercover police officer." (*Zambia, supra*, 51 Cal.4th at p. 981.)

Wright suggests we disagree with this binding precedent and endorse what Wright views as the better reasoned dissenting opinions therein. We decline to do so. We therefore need not address whether, even if Wright had identified error in the pandering instruction, it would provide a basis for reversal, given the evidence suggesting two of the victims were not in fact prostitutes prior to meeting Wright, and supporting the alternative predicate offense of pimping as to C.R. and S.T.

DISPOSITION

We therefore affirm.
NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

BENDIX, J.